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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EDDYE MELARAGNO et al.,

Plaintiffs and Appellants,

v.

ELISE BALGLEY et al.,

Defendants and Respondents.

A091191

(Alameda County
Super. Ct. No. 790323-4)

This appeal follows the granting of a motion for summary judgment in an action for legal malpractice. Plaintiffs Eddy Melaragno and Nina Ringgold raise various issues relating to the summary judgment motion and to three intermediate orders by the trial court. We find none of their contentions has merit and affirm the judgment.

BACKGROUND

The dissolution of Ringgold's marriage has led to several appeals to this court. Ringgold and Melaragno, who is Ringgold's mother, have challenged orders in the dissolution proceedings. (See, e.g., *In re Marriage of Lockhart* (July 30, 1998, A072489, A076521, A078751) [nonpub. opn.]; *In re Marriage of Lockhart* (A092954) [nonpub. opn. filed concurrently with this opn.].) They have appealed from a judgment against them in a lawsuit involving the attorneys who represented Ringgold's former husband. (*Ringgold v. Richmond* (April 6, 2001, A088783) [nonpub. opn.].)¹

¹ The trial court properly took judicial notice of our decision in consolidated appeal numbers A072489, A076521, A078751. Therefore, so do we. (Evid. Code, § 459, subd. (a).)

Plaintiffs now sue their former attorneys, defendants Elise Balgley and Law Offices of Bernard & Wood. The allegations of malpractice arise from the dissolution proceedings and an unrelated matter involving a fee dispute between Ringgold, who is an attorney, and former clients of hers.

Underlying Action No. 1: Melaragno and the Dissolution Proceedings

Ringgold's former husband joined Melaragno in the dissolution proceedings, alleging she claimed an interest in marital real property. She retained defendants to defend her property interest. The issue was tried and the trial court found Melaragno had no interest in the property. We affirmed that finding.

Underlying Action No. 2: Ringgold Fee Dispute

Ringgold retained defendants to represent her in the fee dispute with four women whom she represented in a sexual harassment case. Ringgold sued her former clients alleging they owed her certain fees and costs. The former clients filed a cross-complaint, alleging breach of fiduciary duty and fraud. Eventually the fee dispute was settled. Money held in a trust account was distributed to Ringgold and her former clients, but Ringgold's professional liability insurer also paid her policy's limits to her former clients.

Allegations in the Instant Action

Plaintiffs alleged defendants failed to properly handle the trial of Melaragno's property interest, failed to protect her privacy, and forced her to sign a fee agreement after trial. With respect to Ringgold's fee dispute, plaintiffs alleged defendants failed to investigate and prepare the case against the former clients, failed to tender the defense of a cross-complaint to her insurance carrier, and "improperly and callously" served a copy of the cross-complaint on "her adversary in the dissolution proceeding." Plaintiffs asserted causes of action for malpractice, breach of contract, breach of fiduciary duty, deceit, and constructive fraud.

Defendants moved for summary judgment. The trial court granted the motion, finding plaintiffs proffered no evidence showing they would have achieved a more favorable result in the underlying actions, but for defendants' alleged negligence.

DISCUSSION

A. Clerk's Certificate "Jurisdictional" Issue

Before reaching the merits of the summary judgment motion, we consider plaintiffs' claim of "jurisdictional error" with respect to a default that had been entered against defendants.

Plaintiffs filed their complaint in Los Angeles County Superior Court in June 1996. Defendants were served in May 1997. In August 1997, plaintiffs had the superior court clerk enter a default against defendants. It appears this default was improperly entered while a motion for change of venue was pending. On September 5, 1997, the clerk issued a certificate stating the default should not have been entered because of the pending motion to change venue. The trial court then granted the venue motion and transferred the matter to Alameda County.

Though plaintiffs apparently complained about the clerk's certificate vacating the default to judges in both Los Angeles and Alameda Counties, plaintiffs did not file (two) formal noticed motions to vacate the clerk's certificate until two years later, in October 1999, after defendants filed their motion for summary judgment and just before a scheduled trial date of November 5, 1999. The trial court found plaintiffs' motions untimely and denied them.

Entry of a default is not jurisdictional in the sense of precluding the trial court from taking further action. (*Brown v. Pacific Tel. & Tel. Co.* (1980) 105 Cal.App.3d 482, 486.) A party may waive a claim that a default has been erroneously vacated by the trial court. (See *ibid.* [plaintiff took no action in trial court to challenge propriety of trial court's order vacating a default].) Though plaintiffs did take action in the trial court in the instant case, they waited far longer to act than any reasonable person would under the circumstances.

"[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855.)

Given the untimeliness of plaintiffs' motions and the strong policy to hear cases on the merits, the trial court acted within its discretion when it denied plaintiffs' motions to vacate the clerk's certificate.

B. *Discovery Sanctions*

A second preliminary matter we must discuss is the trial court's order imposing sanctions in the amount of \$600 on Ringgold following the denial of her motion to permit financial condition discovery. Ringgold contends the trial court should have granted her discovery request, therefore sanctions were inappropriate.

Under Civil Code section 3295, subdivision (c), a plaintiff must obtain a court order before conducting discovery regarding the financial condition of a defendant. The plaintiff must file a motion supported by appropriate affidavits, and the court must find that the plaintiff has established that there is a "substantial probability" of prevailing on a claim for punitive damages. (*Ibid.*)

Ringgold moved for permission to conduct financial condition discovery after the close of discovery and after defendants filed their summary judgment motion. Ringgold offered two grounds for her request: (1) Plaintiffs had served a statement of damages requesting punitive damages when the default was entered in 1997; and (2) plaintiffs had established a substantial probability that they would prevail on their claim for punitive damages. Her motion was not supported by any declarations or affidavits. Instead she asked the court to take judicial notice of other papers in the court's file and other requests for judicial notice.

The trial court denied the motion, finding it was "brought without substantial justification."

Ringgold's motion was patently defective. It was not supported by appropriate affidavits as required by Civil Code section 3295. Her points and authorities did not cite to specific evidence in the court's files that would establish a substantial probability that plaintiffs would prevail on a claim for punitive damages.

Code of Civil Procedure section 2017, subdivision (d), in pertinent part provides: "The court shall impose a monetary sanction under Section 2023 against any party,

person, or attorney who unsuccessfully makes or opposes a motion for discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”²

Normally the trial court has broad discretion when imposing discovery sanctions. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496.) In this instance, Code of Civil Procedure section 2017 virtually mandated sanctions.³

C. Summary Judgment

1. Standard of Review

A party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he or she is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*)

We conduct an independent review of the record to determine whether there are any triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) All evidentiary doubts or ambiguities are resolved in favor of the losing party. (*Id.* at p. 768.)

² The quoted text is the second paragraph of subdivision (d) of Code of Civil Procedure section 2017. The first paragraph deals with discovery concerning a plaintiff’s sexual conduct in cases involving sexual harassment, sexual assault or sexual battery. Plaintiffs suggest subdivision (d), therefore, applies only in civil actions involving allegations of sexual misconduct. There is no such restriction in the second paragraph of subdivision (d), and we decline to read the plain language of that paragraph so narrowly.

³ Plaintiffs raise a third preliminary issue. They argue that, if we reverse the judgment, a discovery order pertaining to the subpoena of records from publisher Matthew Bender should be vacated. We need not reach this issue because we affirm the judgment.

2. Procedural Objections

Plaintiffs argue the trial court should have denied the motion for summary judgment as a matter of law because it addressed only their malpractice cause of action.

Plaintiffs alleged various “cause[s] of action” (malpractice, breach of contract, deceit, etc.). Defendants’ summary judgment motion attacked all of plaintiffs’ “claims” on the ground that plaintiffs could not establish “loss causation.”⁴ Regardless of the different legal theories pled, the trial court properly granted summary judgment if plaintiffs could not demonstrate a triable issue as to whether defendants caused any injury. (See *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 664 [misrepresentation and concealment claims based on same conduct and same alleged damages as legal malpractice claim]; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 26, p. 88 [cause of action is based upon the injury to plaintiff, not the particular legal theory of the defendant’s wrongful act]; see also, *id.*, § 24, p. 85.)

Plaintiffs also contend the trial court erred in granting a request for judicial notice made by defendants. But with one possible exception (an arbitration decision), all of the items submitted by defendant were court decisions or records, subject to permissive judicial notice under Evidence Code section 452. Any error in noticing the arbitration decision was harmless.

As we are on the subject of judicial notice, we will digress for a moment to discuss plaintiffs’ pending request for judicial notice in this appeal. Ringgold has consistently failed to comply with the procedures for requesting judicial notice in her past requests in this court. The request now before us fails to furnish sufficient information to enable this court to take judicial notice, let alone allow defendants to prepare to meet the request. (Evid. Code, § 453.) Further, in violation of this court’s rules, plaintiffs have not filed

⁴ Defendants raised other defenses in the summary judgment motion, which plaintiffs argue were not raised in defendants’ answer. The trial court did not rely on these other defenses in granting the summary judgment motion.

and served copies of the matters to be noticed or explained why it is not practicable to do so. (Cal. Rules of Court, rule 41.5.) Nor have plaintiffs complied with the rule for incorporating by reference parts of the record from a prior appeal. (Former rule 11(b); see rule 10(b), eff. January 1, 2002.) We have been lenient in the past and we will grant the request for judicial notice of court records plaintiffs have identified as items L, M, N and P. We will deny the request for judicial notice of item O (declaration of court clerk). We also decline plaintiffs' invitation to take judicial notice of an amicus brief Ringgold filed in *Flanagan v. Superior Court* (A059310, September 20, 1993) [nonpub. opn.]. We sincerely hope, but are not optimistic, that there will be no future requests for judicial notice or incorporation by reference from Ringgold and Melaragno. Should there be, they will be denied absent strict compliance with the Evidence Code and the California Rules of Court.

Finally, plaintiffs contend the trial court abused its discretion in allowing defendants to submit a separate statement of undisputed facts that did not identify all five causes of action and all the elements of defendants' affirmative defenses.

The trial court denied defendants' concurrent motion for summary adjudication based on defendants' failure to comply with rule 342(b) of the California Rules of Court. As for the summary judgment motion, however, the trial court apparently found defendants' separate statement complied with the rules, or alternatively, the court exercised its discretion to excuse any flaw in that statement (see Code Civ. Proc., § 437c, subd. (b)). We observe that defendants' separate statement put plaintiffs on notice that causation was at issue and it identified the relevant facts. We find no abuse of discretion.

3. Merits of Summary Judgment Motion

The trial court found plaintiffs raised triable factual issues as to whether defendants' representation fell below the standard of care. But the court also found plaintiffs proffered no evidence showing they would have achieved a more favorable result in the underlying actions but for defendants' alleged negligence. We agree.

Breach of duty causing only speculative harm is insufficient to create a cause of action for legal malpractice. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1519.)

The plaintiff in a malpractice action must prove he or she would have obtained a judgment in the underlying action and that the judgment or some portion of it would have been collectible. (*Garretson v. Miller* (2002) 99 Cal.App.4th 563, 568-569.) This so-called “case-within-a-case” format is used as a method of proving the elements of causation and damages in actions involving negligence in the prosecution or defense of a legal claim. (*Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 973.)

We reject plaintiffs’ assertion that the case-within-a-case format does not apply because they retained defendants to offer business advice. (See *California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey* (2000) 84 Cal.App.4th 702, 709-710.) According to their complaint, Melaragno retained defendants to represent her “in regards to defending and protecting her legal rights and her property interests” in certain real property. Ringgold retained defendants to represent her in a fee dispute with former clients; to that end defendants filed a complaint on behalf of Ringgold and defended a cross-complaint.⁵

We have searched the record in vain for evidence showing plaintiffs might have obtained a more favorable result in their underlying cases with different representation. Plaintiffs themselves cite not a single piece of evidence in their argument on causation in their opening brief. The allegations of their complaint contain only the barest hint of damages. We are left to assume Melaragno is alleging she would have been awarded an interest in the marital property but for defendants’ alleged negligence, breach of fiduciary duty, deceit, etc.; and that Ringgold would have had a better outcome in the fee dispute with her former clients and in her dissolution action but for defendants’ alleged breach(es).

⁵ Ringgold also alleged defendants represented her in her dissolution action. The case-within-a-case format also applies in that context. (See *Marshak v. Ballesteros*, *supra*, 72 Cal.App.4th at p. 1518.) We do not read *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1095-1097 to require a different standard in dissolution proceedings or in a case involving allegations of breach of a fiduciary duty.

The record is devoid of evidence on the elements of causation and damages. The trial court properly granted summary judgment in favor of defendants.

DISPOSITION

The judgment is affirmed.

Kay, P.J.

We concur:

Reardon, J.

Sepulveda, J.